BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Rate Adjustment Due To Extraordinary Or Exceptional Circumstances	:	**Docket No. R2010-4R**

INITIAL COMMENTS OF THE SATURATION MAILERS COALITION AND VALASSIS DIRECT MAIL, INC.

(July 25, 2011)

Pursuant to Order No. 757, on remand from the decision of the United States Court of Appeals for the District of Columbia Circuit in *United States Postal Service v. Postal Regulatory Commission*, 640 F.3d 1263 (D.C. Cir. 2011), the Saturation Mailers Coalition and Valassis Direct Mail, Inc. hereby submit their initial comments addressing the proper interpretation of the "due to" standard of causation set forth in 39 U.S.C. section 3622(d)(1)(E).

A. The Narrow Issue On Remand

In its core holding, the Court of Appeals agreed with the Commission that "the plain meaning of 'due to' mandates a causal relationship between the amount of a requested adjustment and the exigent circumstances' impact on the Postal Service." *USPS v. PRC, id*., slip op. at 8. However, the court found that the statute was ambiguous with respect to how close the match must be between the amount requested and the harm caused by the exigent circumstance.

> "The statute itself, however, is mute on how close the match must be. In particular, the 'due to' phrase itself is not determinative on this issue because, although it has a plain meaning regarding causal connection *vel non*, as we concluded *supra*, it has no similar meaning regarding the closeness of the causal connection." *Id*. at 9.

Significantly, the court did *not* conclude that the Commission's interpretation was impermissible, but rather that the Commission erred in assuming that its interpretation was required by the "plain meaning" of the statute under a *Chevron* step 1 analysis.[1] Having found that the closeness of the causal connection required by the phrase "due to" is ambiguous, the court remanded to the Commission to conduct a "*Chevron* step 2" analysis:

> "[A]s the agency charged with implementing section 201(d)(1)(E), the Commission was bound to proceed to *Chevron* step 2 to fill the statutory gap by determining how closely the amount of the adjustment must match the amount of the revenue lost as a result of the exigent circumstances. Because the Commission did not proceed to step 2, we remand for it to do so now." *Id*., slip op. at 10.

Importantly, the court's decision cannot be read as giving any direction to the Commission as to the proper resolution of the "due to" ambiguity. As the court acknowledges, the judicial standard for reviewing an agency's *Chevron* step 2 analysis is "whether the agency's answer is based on a permissible construction of the statute." *Id*., slip op. at 7, citing *Chevron,* 467 U.S. at 843.

B. The Only Reasonable Interpretation Of "Due To" Is That Only Those Impacts That Are Due Solely To The Exigent Circumstance Are Recoverable, Factoring Out The Effects Of Non-Exigent Circumstances.

The court held that the plain meaning of "due to" *mandates* a causal relationship between the amount of the Postal Service's requested adjustment and the impact of the

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[1] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. ("Chevron")*, 467 U.S. 837 (1984), established a two-step test for evaluating an agency's interpretation of its governing statute. Under "step 1," if the agency's interpretation is based on and squares with the plain meaning of the statute, the inquiry is done. However, if the statute is silent or ambiguous with respect to an issue, the agency must proceed to a "step 2" analysis, which will be upheld if "the agency's answer is based on a permissible construction of the statute." *Chevron*, *id*., at 483.

exigent circumstance on its finances. But then, in finding ambiguity in the phrase "due to" with respect to the closeness of the causal connection and match, the court stated that in differing contexts "the phrase can mean '*due in part to*' as well as 'due only to.'" *USPS v. PRC*, *id*., slip op. at 10 (emphasis in original).

The Commission's responsibility here is to apply its own judgment and expertise in resolving any ambiguity in the statutory language, taking into account the overall structure and intent of the Postal Accountability and Enhancement Act (PAEA). We submit that the only reasonable and practicable interpretation that makes sense within the context of the PAEA is that the amounts sought by the Postal Service must be limited to that "due *solely* to" the exigent circumstance.

Section 3622(d)(1)(E) itself does not suggest or even hint of any other construction. The only *causative* benchmark in that section is that rate adjustments must be due to "either extraordinary of exceptional circumstances" – i.e., an exigent circumstance. The only exigent circumstance claimed by the Postal Service or identified by the Commission in this proceeding is the economic recession.

In dictum, the court's opinion states that "[a] financial crisis can often result from multiple contributing factors, of which only one may be 'extraordinary or exceptional.'" *USPS v. PRC, id*. at 10. This statement is certainly true with respect to the Postal Service's financial crisis, but is irrelevant under section 3622(d)(1)(E). Many other non-extraordinary and unexceptional factors – such as the inroads of electronic alternatives, the historic decline in First Class volumes, the onerous burdens of retiree health prefunding, and restrictions on the Postal Service's ability to control and cut costs – have contributed mightily to its financial predicament. The fallacy in the court's

statement is that it is backwards. The exigency section does *not* allow above-CPI increases on account of "a financial crisis," but *only* for those financial impacts that are "due to," and hence caused by, an "extraordinary or exceptional" circumstance. Indeed, the court's core holding with respect to causation leads to the conclusion that the only financial impacts that can be recouped through section 3622(d)(1)(E) are those caused by the exigent circumstance *per se*, factoring out the effects of other non-extraordinary factors. Here, the sole extraordinary or exceptional circumstance is the economic recession.

Any other interpretation of "due to" as allowing recovery for any other factors beyond the triggering "extraordinary or exceptional circumstance" would contravene the statutory structure established by Congress. At the time it passed the PAEA, Congress was well aware that the Postal Service faced many economic challenges, yet the paramount pricing mechanism it established in sections 3622(d)(1)(A)-(D) was that postal prices could not be raised in excess of the CPI inflation index. This price-cap mechanism was intended to act as a key incentive for the Postal Service to control its costs and become more efficient. Subsection (d)(1)(E) was clearly intended as a narrow exception limited to "extraordinary or exceptional circumstances." It cannot be construed as a "blank check" provision that allows the Postal Service to piggyback recovery for its other non-exigent financial problems.

This narrow interpretation is not only consistent with the language of the exigency provision and the framework of the PAEA, but it is also the only administratively manageable interpretation. If the Commission on remand were to interpret "due to" as meaning "due *in part* to" the exigent recession, the obvious

conundrum of such a dangling, open-ended interpretation is: what are the other non-exigent "parts" that can be claimed by the Postal Service for compensation under this section? What statutory standards or tests would govern the kinds of non-exigent factors that could be thrown into the wide-open rate-adjustment hopper? The answer is that there are none. Each exigency case would then require *ad hoc* determinations by the Commission as to what other impacts should be allowed, thus complicating the proceedings and generating uncertainty. The far better interpretation is one that provides clarity and predictability both for the Postal Service and mailers, namely, that recovery is limited to the actual impact of the exigent circumstance, and none other.

C. The "Due To" Standard Should Require A Reasonable Estimate Of The Actual Financial Harm Caused Solely By The Exigent Circumstance.

The question of how close the estimate of impact must be is straightforward. Any estimates of economic impact will necessarily involve some imprecision. But the analysis must provide a reasonable and supported estimate of the actual financial harm caused solely by the exigent circumstance, factoring out the impacts of other non-exigent conditions.

In sum, we submit that the Commission's original standard, albeit based on an assumed "plain meaning" of the statute rather than an administrative interpretation of an ambiguous phrase, is the correct standard that best comports with the language of the exigency provision and the overall framework of the PAEA.

Respectfully submitted,

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